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**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**

The Honorable Reed E. Hundt
Chairman
Federal Communications Commission
1919 M Street, NW
Washington, DC 20554

Dear Mr. Chairman:

This letter is sent urging the Federal Communications Commission (hereinafter "FCC") not to open a Notice of Inquiry regarding issues raised by the decision of the distilled spirits industry to advertise on broadcast. The FCC lacks the jurisdiction to regulate broadcast advertising and, in any event, the effort raises First Amendment problems.

The American Advertising Federation - The Unifying Voice For Advertising

The American Advertising Federation (hereinafter "AAF") is the advocate of the rights of advertisers.

AAF educates policymakers, the news media and the general public on the value that advertising brings to the well-being of the nation, and develops the industry's present and future leaders.

AAF accomplishes this through a unique, nationally coordinated grassroots network of advertisers, advertising agencies, media companies, local advertising associations and college chapters. Headquartered in Washington, DC, the AAF serves 50,000 members nationwide in 110 corporations, 216 local professional advertising federations and 200 college chapters.

The FCC lacks jurisdiction to regulate distilled spirits advertising on broadcast

Congress has never enacted legislation which provides jurisdiction over advertising practices to the FCC. Rather, such advertising jurisdiction is statutorily within the purview of the Federal Trade Commission (hereinafter "FTC"). As we write, the FTC is reportedly

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utilizing this regulatory authority over alcohol broadcast advertising to examine certain ad placements. Congress gave the FCC authority to guarantee that our nation's broadcast system was operated in the "public interest." However, we do not believe that this authority justifies the FCC regulating which legal products may be advertised. Congressman John Dingell's recent letter clearly explains the thinking of Congress. "Congress has never given the Commission the ability to censor specific programming or advertising; to prohibit or limit the ability of broadcasters to air commercial advertising; or to prohibit or limit particular advertising of products or services being sold legally in interstate commerce." Letter from Congressman John E. Dingell to The Honorable Reed E. Hundt, January 2, 1997.

When Congress has intended to provide any advertising authority over alcohol to an agency other than the FTC, it has done so in a limited and specific fashion. (See, the Federal Alcohol Administration Act, 27 U.S.C. sec. 201 et seq. and 27 U.S.C. sec. 205(f).)

The FCC has long recognized the limitations on its authority. In its 1969 Notice of Proposed Rulemaking (regarding cigarette advertising) the FCC stated that the "question of an across the board ban is of course one solely for the Congress." It further stated, "We stress again that our action is limited to this unique situation and product..." (See 16 FCC 2d 284, 292)

Likewise, the federal courts have been wary of FCC advertising authority. In upholding FCC imposed Fairness Doctrine obligations on broadcasters which aired tobacco ads the court said, "our cautious approval...does not license the Commission to scan the airwaves for offensive material with no more a discriminating lens than the 'public interest' or even the 'public health'." Banzhaf v. FCC, 405 F2d 654 (D.C. Cir. 1989). Importantly, it was the FCC that subsequently concluded that even the Fairness Doctrine did not represent the public interest and intrudes inordinately on editorial decisions.

Therefore, we believe that the FCC must conclude that it lacks jurisdiction to proceed.

First Amendment principles discourage FCC efforts to regulate truthful, non-deceptive distilled spirits advertising

The American Advertising Federation believes you are proposing to start down a path that will quickly lead to efforts to unconstitutionally restrain truthful, non-deceptive advertising of distilled spirits on the broadcast media. The line of cases from Central Hudson Gas and Electric Corporation v. Public Service Commission of New York, 447 U.S. 557 (1980) through 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495 (1996), demonstrate the U.S. Supreme Court's ever strengthening view that truthful, non-deceptive commercial speech is entitled to First Amendment protection. Only if the government can show that the proposed speech restriction "directly and materially advances" a "substantial governmental interest" and is "narrowly tailored" to "reasonably fit" that interest might that restriction survive.

"The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what government perceives to be their own good." (See 44 Liquormart, supra) Thus, simply because the goal of discouraging drinking among those that are underage is an appropriate one is not an adequate justification to ban dissemination of information regarding a legal product from audiences who are entitled to receive it.

Nor is it adequate to hypothesize or speculate about what injury advertising might cause. Respectfully, we believe your recent comments are not borne out by the research evidence or past experience. "Hard liquor advertising will start an alcohol advertising war. Beer companies will ratchet up their advertising - and we'll have an nuclear advertising race for America's kids. This is a horrifying prospect and not unrealistic." *Clinton to Ask FCC to Consider Restrictions Liquor Commercials* New York Times, April 1, 1997.

Unfortunately, these comments bear close resemblance to the justification government has used for years to ban alcohol strength information on alcohol beverage labels. There (as here) the evidence simply did not exist to support the generalization and the Supreme Court ruled the limitation unconstitutional. Rubin v. Coors Brewing Co., 115 S. Ct. 1585 (1995). The comments also beg the question as to what are effective methods of attacking the underage drinking problem without crossing the line as to what is constitutionally permissible.

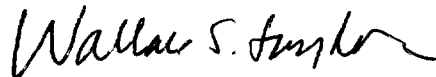
We urge the FCC to discuss any concerns with the FTC, which has the authority and experience to examine advertising issues. The FTC obviously will examine these concerns most closely and respond in an appropriate fashion.

Conclusion

Congress has long ago provided a framework for the FTC to regulate distilled spirits advertising. The FCC is not the appropriate agency to engage in the examination of distilled spirits advertising. Further, any action must be done in strict compliance of the requirements of the First Amendment.

The problem of underage drinking is a serious one. Resolution of the problem requires the public - including law enforcement, educators, advertisers, manufacturers, and parents to work together. Blanket advertising bans will not solve the problem and will place the FCC on a collision course with the First Amendment.

Very truly yours,



cc: Commissioner Quello
Commissioner Chong
Commissioner Ness